luation Review Board. Moreover neither party addressed the Court of Appeal on the question of value as it was apparently common ground that, if the Court of Appeal held the list to be valid, the question of valuation would be best determined by a lower court. In the circumstances their Lordships are of opinion that the case must go back to Singapore for the question of value to be determined by the High Court. It may well be possible for that court to come to a decision on the evidence that was before Rajah J., but it will be for the judge to decide whether he requires further evidence.

Their Lordships take this opportunity of saying that in any appeal where either the Chief Assessor or an owner intends to rely on comparisons with other properties, a list of the subjects alleged to be comparable should be supplied to the other party in good time before the hearing.

Their Lordships will allow the appeal and order that the case be sent back to the Court of Appeal for them to remit it to the High Court to determine the question of value in the light of such evidence limited to value as the parties may put before it.

The appellant has been unsuccessful on the point which occupied much the greater part of the time at the hearing — the validity of the list. He must therefore pay the respondent's costs of this appeal. The order of the Court of Appeal, so far as it finds the respondent (appellant in the Court of Appeal) entitled to his costs in that court, will not be disturbed. The costs of the hearing before Rajah J. in the High Court, so far as relates to the question of value, will be reserved to the judge to whom the case is remitted by the Court of Appeal. The order of the Court of Appeal as to costs in the High Court will be varied to that extent.

Order accordingly.

Solicitors: *Coward Chance; Jaques & Co.*

TONG LEE HUA v. LEE YOKE SAN

[P.C. (Lord Wilberforce, Lord Edmund-Davies, Lord Fraser of Tullybelton, Lord Scarman & Lord Roskill) July 2 & October 13, 1980]

[Privy Council Appeal No. 22 of 1979]

Practice and Procedure — Res Judicata — No previous adjudication.

Contract — Joint promise — Liability — Contracts Act, 1950, s. 44(1).

This was an appeal from the decision of the Federal Court reported in [1979] 1 M.L.J. 24. The Federal Court held that the plea of *res judicata* failed as it had not been shown that the point at issue was determined in the earlier judgment.

Held: it was clear that the learned judge in the earlier proceedings made no adjudication. He only permitted the plaintiff's summons to be withdrawn so that consideration could be given to the matter of adding the others as defendants. The plaintiff was therefore not precluded from subsequently applying to strike out the defences.

Case referred to:-

(1) *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.* [1964] M.L.J. 49.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

F. Fletcher-Cooke Q.C. (*G.T. Rajan* with him) for the appellant.

Robert Pryor for the respondent.

Cur. Adv. Vult.

Lord Edmund-Davies (delivering the judgment of the Board): This is an appeal brought with the leave of the Federal Court of Malaysia from a decision disallowing an appeal from the order of Abdul Hamid J. that the appellant's defence to the respondent's claim be struck out as disclosing no reasonable answer, and further ordering that the respondent be at liberty to sign final judgment for the sum claimed.

The facts are these. In December 1969, a probate suit regarding the estate of one Chi Liung then proceeding in the High Court at Kuala Lumpur, to which the appellant and one Tong Young Fah and eleven others were parties, was compromised on terms which were made a rule of court. Pursuant thereto, an agreement was entered into between the thirteen parties, a term of which was that a valuation of certain property was to be carried out jointly by the respondent (who is in practice at Kuala Lumpur as a chartered surveyor) and another valuer.

On May 28, 1970, Messrs. Richard Talalla and Company, advocates and solicitors, wrote to the respondent with reference to the probate suit, saying that they were acting "for Messrs. Tong Lee Hwa and Tong Young Fah". They enclosed a copy of the agreement, and enquired whether the respondent was prepared to carry out the designated valuation. On June 1 the respondent accepted, and in April of the following year he received the solicitors' written instructions to proceed. Thereafter he carried out the work in two stages, rendering his first bill to the solicitors in October 1971 and the second in March 1972.

No payment being forthcoming, the respondent issued on January 3, 1973, a specially indorsed writ against the appellant and Tong Young Fah for his fees of $35,964 with 6% interest. In answer to his summons for final judgment, the appellant filed a defence that the valuation work "was done at the request of and on behalf of all the parties to the consent order of Probate Suit No. 3 of 1969 and not in his personal capacity", and in his supporting affidavit he asserted that in consequence he was "not individually liable for the sum of $35,964". (It is unnecessary to refer to the defence and affidavit of Tong Young Fah, the second defendant.) The plaintiff's summons for final judgment, supported by his affidavit that there was no defence to the action, came before Mohd. Azmi J. on March 26, 1973. The relevant part of the order then made was in the following terms:

"IT IS ORDERED that the application herein be withdrawn with liberty to join the other parties involved in Probate Suit No. 3 of 1969 as defendants AND IT IS ORDERED that no provision be made as to costs."

There is no information as to what happened thereafter, save that it is clear that no parties were added as defendants. On December 10, 1976, nearly four years later, the plaintiff gave fresh notice of motion for an order "... that the defences of the first

and second defendants herein be struck out as disclosing no reasonable answer..." and that he be at liberty to sign final judgment. On May 23, 1977, the matter came before Abdul Hamid J. in open court, each side being legally represented. Two grounds of defence were relied upon by Tong Lee Hwa:

(1) that the earlier summons of February 1973 had been dismissed by Mohd. Azmi J., and that the matter was therefore *res judicata;*

(2) that the terms of the plaintiff's appointment as valuer were such as to render him not liable for the plaintiff's fees.

The learned judge rejected these pleas and forthwith ordered both defences to be struck out and that the plaintiff be at liberty to sign judgment in the full sum sued for. Giving his reasons on July 18, the learned judge said regarding the plea of *res judicata*:

"[Tong Lee Hwa] has stated that there was a Summons in Chambers filed by the solicitors of the plaintiff to sign final judgment against the [defendants] in respect of the same matter. It is alleged that the application was dismissed and the judge ordered the Civil Suit to be withdrawn with liberty to file afresh after other parties were added as co-defendants. From the court file it would appear that the Summons in Chambers was issued on February 17, 1973 but there is nothing to show that the application was heard. In the circumstances I feel that it is not improper for me to hear the application and decide on its merits."

The learned judge's brief notes of the hearing show that counsel for the plaintiff relied on the terms of Messrs. Richard Talalla's letter of May 28, 1970, and on the provision in section 44(1) of the Contracts Act, 1950, that —

"When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise."

The first defendant rested on his pleaded defence that he was Managing Director of Chi Liung & Sons, that the plaintiff had valued "at the request of and on behalf of all the parties to the consent order of Probate Suit No. 3 of 1969 and not in his [the first defendant's] personal capacity", and that the sum sued for was therefore not due from him individually. Reliance was also sought to be placed on the plaintiff's non-compliance with Order 64, rule 13 of the Rules of the Supreme Court, requiring one month's notice of intention to proceed in cases where no step in the action had been taken for over twelve months, whereas here nearly four years had elapsed since the making of the order of March 23, 1973, and yet no notice had been given by the plaintiff before taking out his fresh summons. But the learned judge concluded that such pleas were frivolous and vexatious and an abuse of the process of the court. He accordingly ordered both defences to be struck out and that final judgment be entered against both defendants in the terms prayed.

When the matter reached the Federal Court on March 21, 1978, the appeals of both defendants were dismissed with costs. Giving reasons in the following September for that decision, Chang Min Tat F.J. said:

"At the appeal, counsel for the appellants elected deliberately to rely only on *res judicata.*

He had another ground of appeal. It was to the effect that the claim of the respondent against the appellants for work done at the request of the appellants should not be met by the appellants as it was done for and on behalf of a company known as Chi Liung & Sons Sdn. Bhd. and also for and on behalf of the Estate of Chi Liung. The appointment of the respondent was by the appellants and though the former accepted the appointment as valuer for the Estate, there was nothing in the letter dated May 28, 1970 to indicate that the appointment was as such valuer. Having regard to the agreement between the beneficiaries of the Estate made on December 15, 1969 that the parties were to act in their personal capacities or their representative capacities or both, and the terms of the said letter, the appointment was more likely to be as valuer of and not for the Estate.

Undoubtedly, counsel for the appellants considered that the law was against him on his contention. He therefore chose to rely entirely on the application of the principle of *res judicata.* The contention was directed to an application by the plaintiff to sign final judgment, on which the order of the court made on March 26, 1973 was that the application was withdrawn with liberty to join the other parties involved in the Probate Suit involving the Estate of Chi Liung.

The respondent, however, did not avail himself of the liberty and instead made an application by notice of motion to strike out the defences of the appellants as disclosing no reasonable answer and as being frivolous and vexatious and to sign final judgment. At the hearing of the notice of motion, an order in terms was made. From that order, this appeal lay and it was said that the order of March 26, 1973 was a judgment in bar of the subsequent notice of motion.

At the hearing of the appeal, it was put to counsel for the appellants that to constitute a *res judicata*, the earlier judgment must, in the terms of the Privy Council decision in *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.*[1] 'necessarily and with precision' determine the point in issue, and he was asked to indicate to the court how the earlier judgment did necessarily and with precision determine the liability of the appellants to pay the respondent for work done for them at their request. He did not do so. We do not, with respect, see how he could succeed.

We did not feel any necessity to call on counsel for the respondent and we accordingly dismissed the appeal."

Leave to appeal from that decision was granted by the Federal Court in December 1978, but the sole appellant to their Lordships is the first defendant, Tong Lee Hwa.

Notwithstanding the absence of any challenge that the only point relied on before the Federal Court was that of *res judicata* the appellant, both in his printed case and before their Lordships, made the following submission:

"Mr. Justice Abdul Hamid would not have proceeded to hear the second application if he had not laboured under a misapprehension as he proceeded on a very wrong presumption that the first application for final judgment was not heard and had in fact no knowledge of the Order made by Mr. Justice Mohamed Azmi.... The first application in fact was heard and an Order confirming the hearing of the said Application was duly extracted and sealed. In the premises above the said Order made by Mr. Justice Abdul Hamid is in fact improper.... Furthermore, it is submitted that Mr. Justice Abdul Hamid has wrongfully exercised, as it would appear, the appellate jurisdiction so as to overrule the decision of Mr. Justice Mohamed Azmi."

Before their Lordships learned counsel for the appellant urged with admirable clarity all that could be said on his behalf. As to the merits, attention was drawn to the plaintiff's acceptance of his appointment as joint valuer being "*for* the estate" and not "of" it, and it was submitted that this indicated that the two defendants had been acting not simply for themselves but for all parties to the agreement in engaging the plaintiff's services. It was further submitted that such wording was sufficient to constitute an "express agreement to the contrary" within the meaning of section

44(1) of the Contracts Act, 1950, with the result that the two defendants were not answerable for the total sum claimed. Regarding *res judicata* it was said that the Federal Court had misdirected itself in treating the hearing before the original judge, Mohamed Azmi J., as though the issue there involved was whether the plaintiff was entitled to *final* judgment, whereas in truth it was whether the defendant had established a case worthy to be tried on the issue of liability. But in their Lordships' judgment no such criticism may properly be levelled. The learned judge was dealing with a summons not only to strike out the defence but also for an order that final judgment for the sum claimed be entered, and he refrained from acceding to or rejecting each of those requests.

Nothing could be clearer than that Mohamed Azmi J. made no adjudication. Instead, he permitted the plaintiff's summons to be withdrawn so that consideration could be given to the matter of adding others as defendants. Having later decided against that course, it is implicit in the later judgment of Abdul Hamid J. that the plaintiff was guilty of no impropriety in issuing some years later a fresh summons to strike out the defences. The first order clearly constituted no bar to his doing this, and the Federal Court were right in so holding.

For these reasons their Lordships regard the appeal as wholly without substance, and they will advise His Majesty the Yang di-Pertuan Agong that it should be dismissed with costs.

Appeal dismissed.

Solicitors: *Philip Conway Thomas & Co.; Stephenson Harwood.*

DAIMAN DEVELOPMENT SDN. BHD. v. MATHEW LUI CHIN TECK & ANOR. APPEAL

[P.C. (Lord Edmund-Davies, Lord Fraser of Tullybelton, Lord Scarman, Lord Roskill & Sir Garfield Barwick) July 8, 9 & October 13, 1980]

[Privy Council Appeal No. 24 of 1979]

Contract — Sale of land and house — Booking pro forma — Developers subsequently sought to increase price — Whether there was a Contract of Sale — Housing Developers (Control and Licensing) Rules, 1970.

Land Law — Sale of land and house by developers — Booking pro forma — Whether formal contract — Whether developers could subsequently increase price — Housing Developers (Control and Licensing) Rules, 1970.

Housing Developers — Booking pro forma — Whether developers could subsequently increase price.

This was an appeal from the decision of the Federal Court reported in [1978] 2 M.L.J. 239. The respondent had paid a booking fee of $700 and signed a booking *pro forma*, according to which the parties agreed the purchase price of the house was $26,000. The respondent also agreed that on receiving notice he would sign the agreement for sale. The appellants, the housing developers, subsequently informed the respondent that the price of the building was increased to $35,100 because of "amendments to the building plans and increase of material and construction." The respondent did not agree to the increased price and subsequently applied to the court for specific performance. The High Court gave judgment in favour of the respondent and the appellant's appeal to the Federal Court was dismissed.

On appeal to the Privy Council it was submitted (a) that upon its true construction the *pro forma* was "subject to contract" in the sense that until a further document was mutually agreed and signed no contractual obligation arose from the *pro forma* itself; (b) that even if the *pro forma* was not "subject to contract" the purported agreement in the *pro forma* remained inchoate for want of agreement between the parties as to the terms and conditions to which the agreement of sale prepared by the solicitors was to be subject; (c) that even if upon its true construction the *pro forma* did give rise to a legal obligation it did no more than give the respondent a right to receive an offer to purchase the lot and house thereon, if the appellant at its option should decide to offer the property for sale.

Held, dismissing the appeal: (1) What might be properly included by the solicitors in the agreement for sale is a question which can be judicially resolved by a court construing the *pro forma*, in the event of any objection by the respondent to any term or condition included by the solicitors in the contract of sale. Thus upon its true construction the *pro forma* did not make either the obligation to purchase or the obligation to sign conditional on the making of some other agreement as to the terms and conditions to be inserted in the contract of sale;

(2) the *pro forma* cannot be construed so as to treat its terms as contractually ineffective until some further agreement had been made by the parties. Nor could it properly be said that the agreement contained in the *pro forma* was inchoate for want of consensual definition of the terms and conditions to be inserted in the contract of sale;

(3) the appellant was clearly bound by the *pro forma* and could not argue that it did not create an obligation to purchase and sell the land.

Case referred to:-

(1) *Masters* v. *Cameron* (1954) 91 C.L.R. 353.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

Gerald Godfrey Q.C. (*Hywel Moseley* with him) for the appellant.

Arthur Lee Meng Kwang for the respondent.

Cur. Adv. Vult.

Sir Garfield Barwick (delivering the judgment of the Board): These appeals consolidated by Order of the Federal Court of Malaysia of February 4, 1979 were heard together. There is no significant difference between them either in point of fact or in the applicable law. Also the parties are agreed that the result of the first-named appeal will determine the fate of the second. Their Lordships accordingly recite only the facts of the first appeal but the advice which they will tender to His Majesty the Yang di-Pertuan Agong will apply equally to both appeals.

The appellant was at all material times a licensed housing developer under the Housing Developers (Control and Licensing) Act, 1966 ("the Act") and the Housing Developers Control and Licensing Rules, 1970 ("the rules"), made pursuant to section 24 of the Act.

In 1972 the appellant owned a large area of land situated at Taman Sri Tebrau, Johore Bahru, Johore, which it proposed to develop as a housing estate, erecting thereon some 1,720 houses of various types, making provision for roads and services for various community purposes. Late in 1972, with a view to attracting the attention of persons seeking to obtain by purchase residential accommodation, the appellant placed on view at its office in the O.C.B.C. Building, Johore Bahru, its plan of sub-division of the land and